**DAITO KOGYO (SARAWAK) SDN BHD** *a*

**v.**

**PORT DICKSON LAND DEVELOPMENT SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-728-99]
28 FEBRUARY 2001

***CIVIL PROCEDURE:*** *Summary judgment - Appeal - Claim for monies owing and payable - Whether claim supported by documents - Whether no arguable issues - Whether no bona fide defence - Whether res judicata applied - Rules of the High Court 1980 O. 14* *c*

***CIVIL PROCEDURE:*** *Res judicata - Issue estoppel - Nature and scope of doctrine - Whether issues already adjudicated upon with finality by court of competent jurisdiction - Whether res judicata applied* *d*

The defendant is the registered proprietor of a piece of land in Port Dickson, Negeri Sembilan ('the land'). By a deed of compromise dated 26 November 1986, the defendant undertook to pay Safuan Daito (JV) Sdn Bhd ('SDJV') a sum of RM7,224,300, and as security thereof created a charge over the land *e* in favour of SDJV. Thereafter, SDJV, with the consent of the defendant, executed a deed of assignment with the plaintiff and assigned to the latter all its rights, title and interest under the deed of compromise. SDJV also executed a transfer of the charge to the plaintiff, with the consent likewise of the defendant. *f*

The defendant defaulted in the payment and the plaintiff, as chargee, successfully applied to the Seremban High Court for an order for sale of the land. The proceeds of the sale, however, fell short of the outstanding sum by RM5,585,086.12, and that being so, the plaintiff applied for and obtained summary judgment for the same under O. 14 Rules of the High Court 1980 *g* ('RHC').

The defendant appealed. Before the learned judge, the defendant argued that summary judgment ought not to be allowed as the deed of compromise was invalid. It was further argued that there was no proper assignment of the *h* principal sum of RM7,224,300 to the plaintiff and that the plaintiff was also guilty of compounding the interest in contravention of the provisions of Civil Law Act 1956. The issues that arose were: (i) whether the defendant had raised any *bona fide* defence; and (ii) whether *res judicata* applied to some of the issues raised by the defendant. *i*

**Held:**

**[1]** The validity of the deed of compromise was beyond question. In the absence of fraud or misrepresentation, the defendant's signatures appearing on the deed of compromise sealed the fate of the defendant. The signatures were sufficient to bind the defendant to the deed. (p 156 f-g)

**[2]** The defendant had full knowledge of the existence of the deed of assignment. Also, as alluded by defendant's directors circular resolution dated 5 December 1986, the defendant was aware of and had consented to the transfer of the charge from SDJV to the plaintiff. In the event, on the strength of the transfer, the plaintiff, as chargee was entitled to enforce the charge. (p 150 b-c)

**[3]** The foreclosure proceedings before the Seremban High Court had been distinctly determined and finally adjudicated upon. That being so, the defendant ought not to be permitted to re-litigate the issues. (p 154 a)

**[3a]** The defendant's affidavits had raised issues which had been raised in the foreclosure proceedings before the Seremban High Court. The defendant's allegation that it had executed the deed of compromise on condition that SDJV's parent company would finance the reclamation project till completion, for instance, was an issue which had been deliberated and adjudicated upon by the said high court. Since the issues had been finally adjudicated upon, the doctrine of *res judicata* applies. (p 157 d-e)

**[4]** There was no evidence to show that the plaintiff was guilty of calculating interest upon interest. The interest herein was rightly calculated on the principal sum of RM7,224,300 from 19 March 1997 to 3 November 1997 calculated at the rate of 10% per annum. (p 154 b-c)

**[4a]** On the evidence, the defendant was justly and truly indebted to the plaintiff to the tune of RM5,585,086.12 as claimed by the plaintiff as at 12 October 1999. There was nothing that could support the defendant's defence or its arguments in countering the O. 14 application. The decision of the learned senior assistant registrar, hence, must be upheld. (p 162 d-f)

*[Summary judgment affirmed.]*

**Case(s) referred to:**

*Abdul v. Doolanbibi [1913] 37 B 563* ***(refd)***
*Alfred Rowntree & Sons Ltd v. Frederick Allen & Sons (Poplar) Ltd [1935] 41 Com Cas 90* ***(refd)***
*Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783* ***(refd)***
*Badar Bee v. Habib Merican Noordin [1909] AC 615* ***(refd)***
*Brunsden v. Humphrey [1884] 14 QBD 146* ***(refd)***
*Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd (No 2) [1966] 2 All ER 536* ***(refd)***
*Danks v. Farley [1853] 1 WR 291* ***(refd)***
*Dhani Ram v. Bhagirashi 22 C 692* ***(refd)***
*Glasgow and South-Western Rly Co v. Boyd and Forrest [1918] SC 14* ***(refd)***
*Hills v. Co-operative Wholesale Society Ltd [1940] 2 KB 435* ***(refd)***
*Ho Giok Chay v. Nik Aishah [1961] MLJ 49* ***(refd)***
*Hoystead v. Taxation Comr [1926] AC 155* ***(refd)***
*Kali v. Bidhu [1912] 16 CLJ 89* ***(refd)***
*Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384* ***(refd)***
*Krishna v. Bunwari [1875] 2 IA 283* ***(refd)***
*Long v. Gowlett [1923] 2 Ch 177* ***(refd)***
*Mac Dougall v. Knight [1890] 25 QBD 1* ***(refd)***
*Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286* ***(refd)***
*Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196* ***(refd)***
*National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ 283 (Rep)* ***(refd)***
*Ormorm Manikavasagam Chetty v. TJ McGregor [1933] MLJ 295* ***(refd)***
*Paramoo v. Zeno Ltd [1968] 2 MLJ 230* ***(refd)***
*Parsotam v. Narbada 26 IA 175* ***(refd)***
*Penang Port Commission v. Kanawagi Seperumaniam (No 3) [1998] 4 CLJ 8* ***(refd)***
*Philips v. Bury [1696] Holt KB 715* ***(refd)***
*Phuman Singh v. Kho Kwang Choon [1965] 2 MLJ 189* ***(refd)***
*Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399* ***(refd)***
*R v. Middlesex JJ, ex p Bond [1933] 2 KB 1* ***(refd)***
*Re F (W) (An infant) [1969] Ch 269* ***(refd)***
*Re Graydon, ex p Official Receiver [1896] 1 QB 417* ***(refd)***
*Re May [1885] 28 Ch D 516* ***(refd)***
*SCF Finance Co Ltd v. Masri and Another (No 3) (Masri, garnishee) [1987] 1 All ER 194* ***(refd)***
*Sediperak Sdn Bhd v. Baboo Chowdhury [1999] 5 CLJ 31* ***(refd)***
*Sheosagar v. Sitaram 24 IA50* ***(refd)***
*Sri Gopal v. Pirthi 24 A 429* ***(refd)***
*Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ 256 (Rep)* ***(refd)***
*Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali Ibrahim [1985] 2 MLJ 225* ***(refd)***
*T Bariam Singh v. Pegawai Pentadbir Pesaka, Malaysia [1983] 1 MLJ 232* ***(refd)***

*Tac Construction & Trading v. Bennes Engineering Bhd [1999] 2 CLJ 117* ***(refd)***
*Tai Lee Finance Co Sdn Bhd v. Official Assignee [1983] 1 CLJ 183; [1983] CLJ 387 (Rep)* ***(refd)***
*Udaiya v. Katama 2 Mad HC 131* ***(refd)***

**Legislation referred to:**
Kelantan Malay Reservations Enactment 1930, s. 9
National Land Code, ss. 206(3), 243, 254, 256(3), 281
Rules of the High Court 1980, O. 14 r. 2

*For the plaintiff - PL Teh; M/s Teh & Assocs*
*For the defendant - Yip Huen Weng; M/s David Lingam & Co*

*Reported by WA Sharif*

## JUDGMENT

**Abdul Malik Ishak J:**

**Background**

This was the plaintiff's claim against the defendant for a sum of RM5,585.086.12 as at 12 October 1999 together with interest thereon at the rate of 10% per annum commencing from 13 October 1999 until full realisation thereof and costs on a solicitor-client basis. By way of encl. 5, the plaintiff filed an application for summary judgment against the defendant under O. 14 of the Rules of the High Court 1980 ("RHC") and on 3 May 2000 the learned senior assistant registrar ("SAR") by the name of Madam Hajjah Wan Azizon Ahmad gave judgment in favour of the plaintiff. Aggrieved by the decision of the SAR, the defendant filed an appeal to the judge in chambers as seen in encl. 13.

**The O. 14 Application In Encl. 5**

The plaintiff's application for summary judgment was supported by the affidavit of Teh Boon Hock ("Teh") that was affirmed on 8 December 1999 as seen in encl. 3. In that affidavit, Teh deposed to the following set of facts.

The defendant was, at all material times, the registered proprietor of all that piece of land held under H.S.(D) 8377 P.T. No. 75 district of Port Dickson, Mukim Port Dickson, Negeri Sembilan ("land"). By a deed of compromise dated 26 November 1986, as seen at exhibit marked as "DK1" of encl. 3 at p. 16, that was entered into between one Safuan Daito (JV) Sdn Bhd ("SDJV") and the defendant, the latter agreed to pay SDJV a sum of RM7,224,300 in the manner and in accordance to the time as stipulated in the deed of compromise. By way of a deed of assignment dated 26 November 1986, as seen in exh. "DK2" of encl. 3 at p. 34, that was executed between SDJV and

the plaintiff, the former assigned absolutely all its rights, title and interests under the deed of compromise to the plaintiff.

In order to secure the repayment of the sum of RM7,224,300, the defendant charged the land in question in favour of SDJV. The charge was duly registered on 21 January 1987 as can be seen in exh. "DK3" of encl. 3 at p. 40 thereof. As the proprietor of the land the defendant was certainly entitled to charge that land. Basically a charge is nothing more than a transaction where the proprietor of the land pledges the land as security for the loan or for payment of an annuity or for other method of payment. The most popular form of a charge would be by way of a repayment of a loan. Under the National Land Code 1965 ("NLC"), once a charge is registered it takes effect immediately as security in the form of a legal interest in the land. Under the Torrens system, there are several ways of effecting a charge over a piece of land. I will now endeavour to list down three of the popular ways resorted to by conveyancing lawyers:

(1) Creation of a legal charge. It envisages a situation where the chargor executes a formal instrument of charge in statutory form in favour of the chargee. Normally, the instrument and the issue document of title would be handed over to the chargee and on its registration the chargee obtains a legal charge over the chargor's land. Under the scheme of the NLC, a second, third and other subsequent legal charges may be created on the land in question.

(2) Creation of an equitable charge. It is created in the same way as the legal charge but with a difference – the instrument of charge would not be registered. But a chargee under an equitable charge is allowed to enter a caveat in order to protect his interest pending the registration of that charge. In the event the chargor defaults, the chargee is allowed to register the instrument and once it is registered the chargee can sell the land.

(3) Creation of a lien. Here there would not be any formal instrument of charge but rather the issue document of title would be deposited with the lender as a pledge. The NLC treats the lien as a security transaction where the entry of a lien-holder's caveat may be necessary (*Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196).

The registration of a legal charge would be effected in accordance with the provisions as set out in s. 243 of the NLC, whereas an equitable charge would bring into sharp focus s. 206 (3) of the NLC. A lien, on the other hand, must comply with the terms as set out in s. 281 of the NLC.

Charges and statutory liens are recognised under the NLC. A charge certainly constitutes an interest in land. This means that it renders the land liable as a security where the chargee could enforce by way of the sale of the land in the event of default by the chargor. In *Ho Giok Chay v. Nik Aishah* [1961] MLJ 49, Hepworth J rightly concluded that a charge was an interest in land in that it rendered the land liable as security under the then Kelantan Land Enactment 1938 - now repealed by the NLC and that the chargee could enforce that security by way of the sale of the land. In *T Bariam Singh v. Pegawai Pentadbir Pesaka, Malaysia* [1983] 1 MLJ 232, Mohamed Zahir J (as he then was) held an opposite view. His Lordship was of the view that a charge did not amount to an interest in land under the Kelantan Malay Reservations Enactment 1930 because the chargee was not given any interest in the land as to the enjoyment and use of it. His Lordship was also of the view that it was not the intention of the legislature to prohibit the creation of charges in favour of the non-Malays but what was prohibited was that in the event of the chargee enforcing the charge by way of sale of the land, the land can never be sold to a non-Malay and in this way it would ensure that the ownership of the land remained in the hands of the Malays, In the context of the Kelantan Malay Reservations Enactment 1930 the decision of T. Bariam Singh was rightly decided. It must be borne in mind that s. 9 of the Kelantan Malay Reservations Enactment 1930 categorically stated that a Malay reservation land can only be sold to a Malay in the event of default by the Malay proprietor under the charge. Such a provision would certainly ensure, in the long run, that ownership of Malay reservation land would remain in the hands of the Malays.

There are no provisions in the NLC which prohibit the creation of equitable charges. An equitable charge would certainly give rise to an equitable right in favour of the creditor. Salleh Abas CJ (as he then was) in *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286 FC laid down the law in a refined language. This was what his Lordship said:

> Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens system, referred to by text writer as Torrens mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when section 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land

Code (see *Haji Abdul Rahman & Anor v. Mohamed Hassan* [1917] AC 209 at 217). That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge or a lien, statutory or equitable which arises as a result of depositing a title deed with the lender.

The decision of the Privy Council in *Haji Abdul Rahman v. Mohamed Hassan, supra*, certainly does not prevent the creation of an equitable charge. In that case agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right. The nature of this contractual right was amplified by Terrell Ag CJ in *Arunasalam Chetty v. Teah Ah Poh Trading & Anor* [1937] MLJ 17 at 21, to be a security for debt outside the provisions of the Land Code.

On the other hand if *Haji Abdul Rahman*'s case, *supra*, is considered to have the effect of preventing the creation of an equitable charge, the effect of the decision cannot be extended to other cases. In that case the agreement was held void as a transfer or as a burdening instrument because it contravened section 4 of the Selangor Registration of Titles Regulation 1891. This section prohibited the transfer, transmission or the creation of any mortgage or charge, or otherwise dealt with except in accordance with the provisions of this Regulation, and 'every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same except as aforesaid, shall be null and void and of non-effect ... . ' And section 41 enacted that 'whenever any land is intended to be charged or made security in favour of any person, the proprietor shall execute a charge in the form contained in Schedule. E, which must be registered as hereinbefore provided.

But the subsequent Land Code and the present National Land Code do not contain provisions similar to section 4 of the above-quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of court decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement or an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (See *Ngan Khong v. Bamah Pakah Jamin & Anor* [1935] FMSLR 81; *Arunasalam Chetty v. Teah Ah Poh Trading, supra, Vallipuram Sivaguru v. Palaniappa Chetty* [1937] 6 MLJ 59 and *Mercantile Bank v. Official Assignee* [1939] MLJ 196). The basis of this ruling is the very raison d'etre of the court's own existence and the imputed intention of the legislature. Terrell Ag CJ in *Arunasalam Chetty*'s case, *supra*, said:

> ... It is the duty of the courts to do justice between parties, and unless expressly prohibited by statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds ... (page 22)

> ... but it is difficult to believe that it was the deliberate intention of the Kedah Legislature by the mere omission to exclude the recognition of the principle of an equitable deposit (page 21).

These statements were supported by Whitley Ag C.J. (SS) who sat in the same case and said:

> ... the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes (page 18).

Raja Azlah Shah J (as he then was) reaffirmed this judicial attitude in *Mercantile Bank Ltd* case, *supra*, when he said:

> ... unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties ... (page 197).

> There is, however, no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charges and liens are permissible under our land law. We, therefore, think that the words 'or other charge on land' in section 21(1) of the Limitation Act must be construed to include equitable charges and liens as well ... .

The case of *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd (supra)* aptly laid down the principle that an agreement to secure a debt in favour of the creditor in regard to the debtor's land will invariably create an equitable charge in favour of the creditor. According to and depending on the intention and conduct of the parties, there may arise a situation where the creditor's right to a charge in equity under the agreement may arise. And that right under the contract would be preserved and recognised under sub-s. (3) of s. 206 of the NLC where the court, in the exercise of its equitable jurisdiction, may, in appropriate circumstances, grant the creditor specific performance of the contract in question. This the court would certainly be entitled to do and it would do by way of ordering the debtor to execute a valid and registrable document of charge.

In regard to a lien, I have this to say. There must be an intention to create a lien. Such an intention can be gathered and deduced when the issue document of title to the land has been deposited with the lender as security for the loan and for no other purpose (*Paramoo v. Zeno Ltd* [1968] 2 MLJ 230 (Federal

Court)). It must be emphasised that according to the case of *Ormorm Manikavasagam Chetty v. TJ McGregor* [1933] MLJ 295 the mere parting of possession with the issue document of title to the land for some intention other than that of giving up the lien would not cause the lien to be lost. And according to the case of *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196, the failure to enter a lien – holder's caveat will not necessarily deprive the lender of the right to a lien in equity provided that the prerequisite intention to create a lien coupled with the deposit of the title to the land are present and reflected in the facts and circumstances of the case.

Back to the mainstream of the case, it would be opportune to mention that pursuant to cl. 3(1) of the deed of compromise the defendant consented to a transfer of the said charge over the land to the plaintiff with the full knowledge and agreement of SDJV as evidenced by the defendant's directors' circular resolution dated 5 December 1986 as seen in exh. "DK4" of encl. 3 at p. 57 thereof. The transfer of that charge from SDJV to the plaintiff was duly registered on 19 March 1987 as reflected at "Borang 14B" which was exhibited and marked as exh. "DK5" of encl. 3 at p. 59 thereto. On the strength of the transfer of the charge, the plaintiff as chargee became entitled to enforce the charge in question.

It would be germane, at this juncture, to reproduce the relevant terms and conditions of the charge as seen in encl. 3. At p. 44 of encl. 3, s. 1.02 of the charge annexure reads as follows:

> Section 1.02 Deed of Compromise
>
> By a Deed dated the 26th day of November, 1986 (hereinafter called 'the Deed of Compromise') and made between the Chargor and SDJV, the Chargor agreed to pay to SDJV, the sum of M$7,224,300.00 (hereinafter called the Indebtedness) at the times and in the manner therein stated and upon the terms and subject to the conditions contained therein.

Section 1.03 of the charge annexure at p. 44 of encl. 3 reads as follows:

> Section 1.03 Execution of Charge Under the National Land Code
>
> By the Deed of Compromise, it was agreed, *inter alia*, that the Indebtedness interest thereon and all other moneys owing and payable by SDJV under the terms of the Deed of Compromise should be secured by this Charge.

Section 8.02 of the charge annexure at p. 52 of encl. 3 reads as follows:

> Section 8.02 Late Payment
>
> In the event of default by the Chargor in the payment on due date of any sum (whether (as) principal, interest or otherwise) due to SDJV under this

charge the Chargor will on demand pay to SDJV interest on such sum from the date of such default up to the date of receipt by SDJV (as well after as before judgment) at the rate of ten percent (10%) per annum.

At p. 53 of encl. 3, s. 9.04 of the charge annexure reads as follows:

Section 9.04 Costs

The Chargee shall be liable to pay all fees and expenses in connection with or incidental to this Charge including SDJV's solicitors' fees (on a solicitor and client basis) in connection with the preparation and execution of this Charge and the documents related thereto. If the moneys hereby secured or any part thereof shall be required to be recovered through any process of law, or if the moneys hereby secured or any part thereof shall be placed in the hands of the solicitors for the collection, the Chargor shall pay (in addition to the moneys then due and payable and hereby secured) SDJV's solicitors' fees (on a solicitor and client basis) and any other fees and expenses incurred in respect of such collection.

Finally, at p. 54 of encl. 3, s. 9.06 of the charge annexure reads as follows:

Section 9.06 Notices

A demand for payment of moneys or any other demand or notice to the Chargor under this Charge may be made by the Director, Manager, Secretary, Accountant or other officer for the time being of SDJV or by any person or firm for the time being acting as solicitor or solicitors for SDJV by letter addressed to the Chargor and sent by post to or delivered at the address of the Chargor hereinbefore stated or to such other address as may from time to time be notified by the Chargor to SDJV for such purpose and any and every demand and notice sent by post shall be deemed to have been made or given 48 hours after the letter was posted in the States of Malaya and notwithstanding the fact that the letter may be returned to the post office.

I will now proceed to reproduce in verbatim the relevant terms and conditions of the deed of compromise. Clause 1(1) of the deed of compromise at p. 18 of encl. 3 reads as follows:

1. PAYMENT OBLIGATIONS

(1) In consideration of the premises PDLD shall pay or cause to be paid to SDJV the Principal Amount at the times and in the following manner:

IN ONE LUMP SUM ON OR BEFORE 31ST AUGUST 1988.

While cl. 1(2) of the deed of compromise at p. 18 to p. 19 of encl. 3 reads in this way:

(2) to pay interest on the Principal Amount at the rate of ten per cent (10%) per annum calculated on a yearly basis from 1st JANUARY 1986 to the

date of full repayment, both dates inclusive; such interest to be paid together with the payment specified in Clause 1(1)(a) hereof.

Teh proceeded further to depose that the defendant failed to repay the debt with interest thereon on or before 31 August 1988. This prompted the plaintiff's solicitors to make a demand on the defendant for the payment of the debt that came to RM7,224,300 together with interest thereto. That letter of demand was dated 8 June 1990 and it was exhibited as exh. "DK6" of encl. 3 at p. 64 and it was worded as follows:

We act for Daito Kogyo (Sarawak) Sdn. Bhd., the Chargee of the above captioned land.

On our client's instructions, we give you notice that you are in default of:

(a) Clause 1 of the Deed of Compromise (dated 26th November 1986) made between you and Safuan Daito (J.V.) Sdn. Bhd., the benefit of which Deed (together with the said charge) has been assigned and transferred (respectively) to our client; and

(b) Section 3.01 of the Annexure to the said Charge.

On our client's instructions we hereby give you notice to remedy the said breach by paying to us or to our client the sum of M$7,224,300-00 together with interest thereon at the rate of 10% per annum (with yearly rests) from 1st January 1986 to the date of full payment: such payment to be received by us or our client within 7 days of the receipt of this letter.

Please be informed that in default of your compliance to the demand aforesaid, our client shall proceed with legal action to obtain an Order of Court for the sale of the said land.

The defendant refused to pay and it ignored the letter of demand. On 26 October 1990, the plaintiff then caused a notice to be issued and that notice was a notice under s. 254 of the NLC. That notice can be seen at p. 67 of encl. 3 and it was marked as exh. "DK7" and it was worded in this way:

**NATIONAL LAND CODE**
**FORM 16D**
**(SECTION 254)**
**NOTICE OF DEFAULT WITH RESPECT TO A CHARGE**

To: PORT DICKSON LAND DEVELOPMENT SDN. BHD.
No. 7 Jalan Raja Abdullah
50300 KUALA LUMPUR

Chargor under the Charge described in the schedule below of the land so described.

WHEREAS you have committed a breach of the provision in this Charge by failing to pay the sum due to the Chargee of M$7,224,300.00 as at the 31st day of August 1988 in accordance with the terms thereof and interest thereon at the rate of 10.00% per annum with yearly rests from the 1st day of January 1986 and continuing.

AND WHEREAS the breach has continued for a period of seven (7) days prior to the date of this Notice.

We, as Chargee, by virtue of the powers conferred by Section 254 of the National Land Code, hereby require you within the period of seven (7) days from the service of this Notice to remedy the breach failing which we shall apply for an Order for Sale.

Dated this 26th day of October 1990

Sgd. (Illegible)

...

Messrs. Teh & Associates
Solicitors for the Chargee

The defendant remained stubborn and refused to comply with the said notice.

On 15 November 1990 the plaintiff applied for an order for sale of the land in question pursuant to s. 256 of the NLC in the Seremban High Court *vide* originating summons number 24-459-90. Mohd. Noor bin Haji Abdullah J sitting in the Seremban High Court granted the order for sale of the land on 9 October 1995 as seen in exh. "DK8" at p. 70 of encl. 3. Aggrieved by the order for sale of the land in question, the defendant had, on 7 November 1995, appealed to the Court of Appeal *vide* Civil Appeal number N-02-720-95. Section 256 of the NLC enacts as follows:

256. Application to Court for order for sale.

(1) This section applies to land held under:

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

and it gives the power to the court to make an order for sale. But there are certain circumstances where an order for sale would not be granted and these circumstances may conveniently be listed in the following ways:

(1) where the chargee has been fraudulent or where the chargee and chargor have acted in collusion to defraud third parties (*Tai Lee Finance Co Sdn Bhd v. Official Assignee* [1983] 1 CLJ 183; [1983] CLJ 387 (Rep);

(2) In cases where non-compliance with the requirements of the Moneylenders Ordinance, 1951 existed (*Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189 FC);

(3) "existence of cause to the contrary" – borrowing the words of sub-s. (3) to s. 256 of the NLC. The phrase covers a whole gamut of situations. It would cover those cases where the chargees are guilty of any unreasonable conduct and where the rights of innocent third parties would be affected by the granting of the order for sale (*Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 FC). Salleh Abas CJ (Malaya) (as he then was) in *Kheng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Ors (supra)*, in a style of his own, aptly said (see p. 388 of the report):

> The phrase 'cause to the contrary' used by the National Land Code and 'cause be shown to the satisfaction of the court' used by the FMS Land Code, in our view, convey the same meaning and bear the same concept. What then is the meaning of the phrase 'cause to the contrary' and how should the court proceed to determine its meaning?
>
> In *Murugappa Chettiar v. Letchumanan Chettiar* [1939] M.L.J. 296 Aitken J. who sat with McElwaine C.J. (S.S.) and Murray-Aynsley J. to form the F.M.S. Court of Appeal said:
>
> > … Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the Courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

At p. 389 of the report, his Lordship continued in serious vein:

> From the review of the above cases, we are of the opinion that the court has not only to apply the law but also invoke the aid of equity in order to be satisfied as to whether 'a cause to the contrary' has been shown or not. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of 'innocent third parties' to be affected by the order.

So much for the law and now back to the facts. Since there was no stay of the order for sale of the said land, the land was eventually sold by public auction on 8 March 1997 at the rate of RM11,400,000. The contract of sale as exhibited in exhibit marked "DK9" of encl. 3 at p 75 thereof was worded in this way:

**KONTREK**

MEMORANDUM: Dalam jualan dengan Lelong Awam pada 8 haribulan Mac 1997, mengenai harta yang terkandung dalam butir-butir yang tersebut diatas No. Hakmilik H.S.(D)8377, No. P.T. 75, Mukim dan Daerah Port Dickson, Negeri Sembilan penawar tertinggi dan diisytiharkan sebagai pembeli harta tersebut bagi jumlah wang sebanyak RM11,400,000 telah membayar kepada Penolong Kanan Pendaftar, Mahkamah Tinggi, Seremban sebagai wakil bagi penjual untuk jumlah wang sebanyak RM1,140,000 sebagai wang deposit dan bersetuju membayar baki harga pembelian dan menyempurnakan pembelian tersebut dan Penolong Kanan Pendaftar, Mahkamah Tinggi, Seremban mengaku menerima wang deposit tersebut.

TANDATANGAN PEMBELI

HARGA PEMBELIAN: RM11,400,000.00
DEPOSIT: RM1,140,000.00
BAKI: RM10,260,000.00

Sgd. (Illegible)

...
ANWAR TAN BIN ABDULLAH
I/C: 580209-10-5369

Add: TIVOLI VILLAS
APT, ID-7-1
JLN MEDANG TANDUK
BUKIT BANDARAYA
59100 K.L.

TANDATANGAN
PENOLONG KANAN
PENDAFTAR,
MAHKAMH TINGGI,
SEREMBAN.

TANDATANGAN
PELELONG BERLESEN
Sgd. (Illegible)
...

Sgd. (Illegible)
...
Penolong Kanan Pendaftar,
Mahkamah Tinggi,
Seremban.
S 158

TANDATANGAN
PEGUAM

Sgd. (Illegible)
...
Miss. P.L. Teh.

By 8 March 1997, the defendant owed the plaintiff a sum of RM15,299,680.80. The nett proceeds of the sale of the land in question came up to RM11,114,975 after deducting the court commission of RM285,025. The statement of accounts and the payment voucher emanating from the Seremban High Court can be seen in exh. "DK10" at p. 77 of encl. 3.

It must be emphasised that in the process of enforcing the charge, the plaintiff incurred expenses in the sum of RM25,137.63. The plaintiff acted prudently by exhibiting the relevant documents in encl. 3 thereto and these documents may be itemised in this way:

(1) the valuer's bill and official receipt for the auction as seen at exh. "DK11" of encl. 3 at pp. 81 and 82;

(2) the auctioneer's bill and official receipt as reflected at exh. "DK12" at p. 84 to p. 86 of encl. 3;

(3) the valuer's bill and official receipt for the auction at exh. "DK13" of encl. 3 at pp. 88 and 89; and

(4) the auctioneer's bill and official receipt as seen at exh. "DK14" at p. 91 to p. 93 of encl. 3.

The appeal by the defendant to the Court of Appeal against the order for sale of the said land as ordered by the Seremban High Court was withdrawn on 14 June 1999. The order from the Court of Appeal was extracted and it was exhibited as exh. "DK15" at p. 95 of encl. 3.

On the strength of the matters as alluded to above, it was the stand of the plaintiff that the defendant was justly and truly indebted to the plaintiff to the tune of RM5,585,086.12 as at 12 October 1999. The plaintiff's solicitors by letter dated 12 October 1999 made a formal demand to the defendant to pay the sum of RM5,585,086.12 as seen in exh. "DK16" at p. 98 to p. 100 of encl. 3 and that letter of demand was quite thorough and it was worded in this way:

a TBE/2439/90(PL:G) 12th October 1999
A.R. REGISTERED

M/s Port Dickson Land Development Sdn Bhd
Tingkat 24, Menara Safuan
No. 80, Jalan Ampang
b 50450 Kuala Lumpur

Dear Sirs,

**Re: Land held under H.S. (D) 8377 P.T. No. 75**

District of Port Dickson, Negeri Sembilan
c

We act for Daito Kogyo (Sarawak) Sdn Bhd who was at all material times the Chargee of the above captioned land.

Our instructions are that by a Deed of Compromise dated 26th November 1986 entered into between yourselves on the one part and Safuan Daito (J.V.) Sdn
d Bhd on the other part, you agreed amongst other things to pay to the said Safuan Daito (J.V.) Sdn Bhd a sum of RM7,244,300.00 at the times and in the manner specified in the said Deed of Compromise. Further in accordance therewith you executed and created a charge over the said land to secure the payment of the said sum of RM7,244,300.00 together with interest thereon, same of which was registered on 21st January 1987 *vide* Presentation No: 437/
e 87 Jilid 583 Folio 9.

In accordance with the terms of the said Deed of Compromise, you had consented to a transfer of the said charge to our client and on 19th March 1987, a Transfer of Charge dated 11th March 1987 was duly registered *vide*
f Presentation No: 1933/87 Jilid 1152 Folio 17 being a Transfer of Charge of the said charge from Safuan Daito (J.V.) Sdn Bhd to our client.

Our client's further instructions are that in breach of the Provisions of the said Deed of Compromise you failed, refused and/or neglected to repay the said debt of RM7,224,300.00 together with interest thereon on or before 31st August 1988 although demands therefor had been made: as a consequence of which
g our said client proceeded to apply to the Seremban High Court for an Order For Sale of the said land pursuant to section 256 of the National Land Code *vide* Originating Summons No: 24-459-90 on 15th November 1990 after having served on you a Notice in Form 16D dated 26th October 1990 and you had failed to remedy the breach in respect of the said charge within seven (7) days
h of the receipt of the said Form 16D.

An Order For Sale was made on 9th October 1995 and the said land was sold by public auction pursuant thereto on 8th March 1997 at RM11,400,000.00.

On our client's instructions, we now demand payment from you within seven (7) days from the date hereof, of the sum of RM5,585,086.12 being the balance
i debt due and owing by you to our client as at 12th October 1999; in default

of which we shall institute legal proceedings against you for recovery of same, plus interest and costs on a solicitor-client basis without further reference. Particulars of the sum of RM5,585,086.12 (as at 12th October 1999) are as follows:

| | | |
|---|---|---|
| 1. Principal sum | … | RM7,224,300.00 |
| 2. Interest thereon at 10% p.a. from 1st January 1986 to 9th October 1995 (date of Order For Sale) | … | RM7,058,041.10 |
| 3. Interest thereon at 10% p.a. from 10th October 1995 to 8th March 1997 (date of Public auction) | … | RM1,017,339.70 |
| 4. Further interest on RM7,224,300.00 at 10% p.a. from 9th March 1997 to 3rd November 1997 (date of receipt of proceeds from public auction) | … | RM 473,043.18 |
| Less | | |
| Nett proceeds from sale | | (RM11,114,975.00) |
| | | RM 4,657,748.98 |
| 5. Interest on RM4,657,748.98 at 10% p.a. from 4th November 1997 to 12th October 1999 (707 days) and such interest is still continuing at the rate of RM1,276.09 per day | … | RM 902,199.51 |
| 6. Other expenses incurred in respect of collection of moneys secured by the charge (section 9.04 of the charge document) | | |
| A. Public auction on 22nd March 1996 | | |
| (i) Valuation Report (Vigers (KL) Sdn Bhd) Bill No: 0237 dated 7th November 1995 Official Receipt No: 01216 dated 13th February 1996 | … | RM 8,700.00 |
| (ii) Auctioneer's fees (Raine & Horne Zaki + Partners Sdn Bhd) Bill No: S/207/96 dated 4th April 1996 Official Receipt No: 3697 dated 25th May 1996 | … | RM 4,244.70 |

B. Public auction on 8th March 1997

| | | | |
|---|---|---|---|
| (i) Valuation Report (Vigers (KL) Sdn Bhd) Bill No: 0721 dated 26th September 1996 Official Receipt No: 01580 dated 25th October 1996 | … | RM | 8,070.00 |
| (ii) Auctioneer's fees (Raine & Horne International Zaki + Partners Sdn Bhd) Bill No: S/256/97 dated 28th March 1997 Official Receipt No:4727 Dated 21st June 1997 | … | RM | 4,122.93 |
| | | | RM5,585,086.12 |

Thank you.
Yours faithfully,
Sgd. (Illegible) 12/10
c.c. client (By Fax only No: 00-813-3681-7020)
/sal

and the AR registered card at exh. "DK16" of p. 101 showed that the defendant had received the letter of demand from the plaintiff's solicitors. It was the stand of the plaintiff, pure and simple, that there was no defence on the part of the defendant and for these reasons the plaintiff urged this court to dismiss the appeal in encl. 13 with costs.

Before the learned SAR, the defendant resisted the summary judgment application and in doing so, the defendant filed two affidavits, namely:

(1) the affidavit in reply by Dato' Haji Mat @ Mat Shah bin Ahmad @ Sapuan affirmed on 17 February 2000 as seen in encl. 7; and

(2) the affidavit in reply of Dato' Haji Mat @ Mat Shah bin Ahmad @ Sapuan that was affirmed on 15 March 2000 as seen in encl. 10.

These two affidavits of Dato' Mat Shah were quite interestingly worded and the issues that were canvassed in these two affidavits may conveniently be summarised in these words:

(1) that the defendant had not at any time received a written request from SDJV for the defendant's consent to assign the principal sum of RM7,224,300 or to transfer the said charge to the plaintiff (see paras. 6 and 8 of encl. 7 and paras. 6 and 7 of encl. 10); and the following points were used to bolster up this argument:

(a) that under the NLC, the chargor was not obliged to the chargee unless the chargor has been notified of the transfer of the charge (see para. 10(a) of encl. 7);

(b) that the principal sum had not, at any time, been assigned by SDJV to the plaintiff and that being the case the defendant was said not to owe the plaintiff (see paras. 10(c), 11 and 12 of encl. 7);

(c) that the creation of the said charge for the benefit of the plaintiff was unsupported by any consideration (see para. 10(d) of encl. 7);

(d) that the obligations of the defendant under the charge and the deed of compromise were to pay SDJV and not the plaintiff (see para. 10(e) of encl. 7);

(2) that the defendant agreed to execute the deed of compromise on condition that SDJV gave its assurance that its parent company, namely, Daito Kogyo Co Ltd will finance the reclamation project at Port Dickson until its completion (see para. 13 of encl. 7). It was averred that since SDJV had failed to ensure such financing by Daito Kogyo Co Ltd, the defendant was thereby released from its obligations under the deed of compromise and the charge thereto (see para. 14 of encl. 7);

(3) That the plaintiff had unfairly imposed compound interest contrary to the Civil Law Act 1956 (see para. 19 of encl. 7).

The plaintiff responded to Dato' Mat Shah's two affidavits by filing two affidavits through Teh as seen in encl. 8 that was affirmed on 1 March 2000 and another affidavit also affirmed by Teh on 30 March 2000 as seen in encl. 11.

As alluded to earlier, the two affidavits affirmed by Dato' Mat Shah in encls. 7 and 10 raised three issues itemised as (1) to (3). I will now proceed to examine these issues separately.

**Issue (1)**

Teh affirmed an affidavit in encl. 11 by way of a rebuttal and there Teh deposed that the defendant had indeed consented to, not only, the creation of the charge over the said land but also the subsequent transfer of the said charge by SDJV to the plaintiff. Indeed what Teh had deposed to in encl. 11 was supported by the defendant's directors' resolutions as seen in exh. "BH-A" and "BH-B" of encl. 11 at pp. 13 and 15 respectively and by the directors' resolutions emanating from SDJV as seen in exhs. "BH-C" and "BH-D" of encl. 11 at pp. 17 and 19 respectively.

Teh also deposed in encl. 11 to the effect that the signatories to SDJV's resolutions in exhs. "BH-C" and "BH-D" were the same as the charge in Borang 16A which was signed on behalf of the defendant as seen in exh. "DK3" of encl. 3 at p. 40 thereof. Incidentally these two signatories were also the same with the signatory that appeared in Borang "14B" which was signed on behalf of SDJV as seen in exh. "DK5" of encl. 3 at p. 59 thereto.

A perusal of exhs. "BH-B" and "BH-C" of encl. 11 would clearly show that the transfer of the said charge from SDJV to the plaintiff was with the full knowledge and consent of the defendant and this very fact was alluded to at para. 5 of encl. 11. I must reproduce exh. "BH-B" at p. 15 of encl. 11 which came from the defendant and it was worded as follows:

> Extract of the Directors Circular Resolution dated 5th December, 1986 **Resolved**:
>
> (i) That the Company be and hereby create a Charge under the National Land Code over all that piece of land held under H.S.(D) 8377 P.T.No. 75 Bandar Port Dickson in favour of Safuan Daito (J.V.) Sdn. Bhd. to secure the payment of the sum of $7,224,300.00 in accordance with the provisions of the Deed of Compromise entered into with the said Safuan Daito (J.V.) Sdn. Bhd and that the said Safuan Daito (J.V.) Sdn. Bhd may be at liberty to transfer that said Charge to Daito Kogyo (Sarawak) Sdn. Bhd.
>
> (ii) That the Common Seal of the Company be affixed onto the relevant documents required in the presence of two Directors or in the presence of one Director and the Secretary of the Company.
>
> CERTIFIED TRUE COPY
>
> Sgd. (Illegible)
> ...
> DIRECTOR
>
> Sgd. (Illegible)
> ...
> SECRETARY

and I must also reproduce exh. "BH-C" at p. 17 of encl. 11 which came from SDJV and it was phrased in this way:

> Extract of the Directors' Circular Resolution dated 5th December, 1986. **Resolved**:
>
> (i) That the Company be and is hereby authorised to effect a transfer of the Charge in the Company's favour over the land held under H.S. (D) 8377 P.T. No. 75, Bandar Port Dickson to Daito Kogyo (Sarawak) Sdn. Bhd.

(ii) That the Common Seal of the Company be affixed onto all relevant documents in the presence of two Directors or a Director and the Secretary of the company.

CERTIFIED TRUE COPY

Sgd. (Illegible)
...
DIRECTOR

Sgd. (Illegible)
...
SECRETARY

These documents as reproduced were self-explanatory and they conveyed the message that the defendant really knew what was happening.

It was contended on behalf of the plaintiff that the relevant provision of the NLC relied upon by the defendant was inapplicable as the defendant had not made any payment of the moneys due under the said charge whether before or after the transfer of the charge from SDJV to the plaintiff. At para. 6 (i) of the affidavit affirmed by Teh as seen in encl. 11, it was deposed that the defendant knew fully well about the transfer of the charge to the plaintiff.

Replying to the defendant's allegation that there was no assignment by the principal sum of RM7,224,300 by SDJV to the plaintiff, Teh deposed, on behalf of the plaintiff at para. 6(ii) of encl. 11, that such an allegation was without any basis whatsoever in view of exh. "DK2" as seen at p. 34 of encl. 3. Exhibit "DK2" of encl. 3 was a deed of assignment dated 26 November 1986 between SDJV and the plaintiff. In that deed of assignment SDJV was referred to as the assignor while the plaintiff was referred to as the assignee.

The relevant provisions of the deed of assignment would be preamble 1, preamble 2 and preamble 3 and they were worded in this way (see p. 35 to p. 36 of encl. 3 at "DK2"):

Preamble 1
The Assignor is indebted to Daito Kogyo Co. Ltd., a Company incorporated in Japan, with an office at 6-38 Kameido I-Chone Koto-Ku, Tokyo, Japan in the sum of Yen 836,973,499 as is agreed to and evidenced by a confirmation MS1,024.929.41 dated 20 November 1986 between the Assignor and Daito Kogyo Co. Ltd., (hereinafter referred to as the Assignor-Daito Kogyo Co. Ltd. Deed) as at 30th September 1986.

Preamble 2
As at the date of this Agreement and the Assignor hereby warrants and represents that there is the sum of M$7,224,300.00 due and owing to SDJV

a by Port Dickson Land Development Sdn. Bhd., a Company incorporated in Malaysia with its registered office at Bangunan Safuan, No. 7 Jalan Raja Abdullah, Kuala Lumpur (hereinafter referred to as "the PDLD monies") as agreed to and evidenced by a Deed of Compromise dated 26th November 86 and made between the assignor and PDLD (hereinafter referred to as the Assignor-PDLD Deed).

b

Preamble 3
It is a term and condition of the Assignor-Daito Kogyo Co. Ltd. Deed that the Assignor will consent to an assignment of all its rights title and benefit in and under the Assignor-PDLD Deed to such body or corporation as Daito Kogyo Co. Ltd. may designate. Daito Kogyo Ltd., has designated the Assignee herein to accept such assignment.

c

While cll. 1 and 3 of the deed of assignment were worded in this fashion (see p. 36 of encl. 3 at "DK2"):

d

1. In pursuance of the agreement between the assignor and Daito Kogyo Co. Ltd., and in consideration of the assignment herein contained, the Assignor HEREBY ASSIGNS unto the Assignee all the PDLD monies and all the Assignor's right title and interest in and under the Assignor-PDLD Deed to the Assignee TO HOLD unto the Assignee absolutely.

e

3. The Assignor warrants to the Assignee that the Recital (2) hereof is accurate in all respects and that the Assignor shall cause PDLD to sign and execute an acknowledgment that the PDLD monies are in truth and in fact owing to the Assignor.

f

It would be pertinent to point out that at p. 5 of the deed of assignment (equivalent to p. 37 of encl. 3), the signatures of the signatories that appeared thereto were the same ones as those that appeared at Borang 16A which was the relevant form for the charge and that Borang 16A can be seen at exh. "DK3" at p. 40 of encl. 3. Dato' Mat Shah's signature appearing in the deed of assignment at p. 37 of encl. 3 above the word "director" was similar to his own signature that appeared at p. 41 of the Borang 16A of encl. 3 above

g

the word "pengarah". Shikha Dutt's signature in his capacity as a director/ secretary that appeared in the deed of assignment at p. 37 of encl. 3 was an exact replica to the signature of his that appeared at p. 41 of Borang 16A of encl. 3. The signatures of these signatories conclusively showed that the defendant knew of the existence of the deed of assignment and its effect

h

thereto. The damning feature in regard to Borang 16A at p. 41 of encl. 3 was this: it showed the signatures of Dato' Mat Shah and Shikha Dutt against their respective names – an inescapable conclusion that those signatures were theirs and no one else.

i

**Issue (2)**

Teh deposed in encl. 11 at para. (iii) thereof to the effect that the defendant's allegation that it had executed the deed of compromise on condition that it was wholly untrue was inconsistent and against the express terms of the deed of compromise and the said charge. In fact, Teh deposed at para. 7 of encl. 11 that both issues (1) and (2) were similar to the ones raised by the defendant in the foreclosure proceedings that was filed by the plaintiff against the defendant *vide* originating summons no: 24-459-90 in the High Court at Seremban. Since the issues have been finally adjudicated upon, the doctrine of *res judicata* was said to be applicable.

Now, *res judicata* or a plea of former judgment is a growing doctrine that sees its development moulded through the years by judges from all over the world. In England as well as in America, the plea of *res judicata* is usually dealt with under the category of the law of evidence. In India, *res judicata* is considered to be procedural in nature. Once the court is satisfied that the ground of legal right on which the plaintiff sues was finally dealt with by the judgment of the court, then the plea of *res judicata* would come into play (*Udaiya v. Katama* 2 Mad. HC 131 which was affirmed on appeal *vide* 10 WR1 PC; *Parsotam v. Narbada* 26 IA 175, 21 A 505; *Dhani Ram v. Bhagirashi* 22 C 692; and *Sheosagar v. Sitaram* 24 IA50). Bowen LJ in *Brunsden v. Humphrey* [1884] 14 QBD 146 aptly said that:

> The rule of the ancient common law is that when one is barred in any action, real or personal, by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature, for the same thing forever.

The rule of *res judicata* is founded upon the maxim *nemo debet bis vexari pro una et eadem causa* (no person should be twice vexed for the same course) – a maxim which is itself an outcome of the wider maxim interest *reipublicae ut sit finis litium*. Bluntly put, a matter which has been put in issue, tried and determined by a court of competent jurisdiction cannot be re-opened between those who were parties to such adjudication. It is essential that the court must be competent (*Abdul v. Doolanbibi* [1913] 37 B 563). The crucial test would be not whether the decision was explicit but rather whether the issue was an issue upon which the judgment of the former suit was based (*Sri Gopal v. Pirthi* 24 A 429 PC, *Kali v. Bidhu* [1912] 16 CLJ 89; *Beni Pershad v. Raj Kumar* [1912] 16 CLJ 124). *Res judicata* would also be applied to the grounds of decision as well as to the decision itself (*Krishna v. Bunwari* [1875] 2 IA 283).

Indeed the affidavits filed by the respective parties in the foreclosure proceedings as seen in exhs. "BHE" to "BHK" at p. 21 to p. 98 of Teh's affidavit in encl. 11 together with the certified true copy of the grounds of

judgment of Mohd Noor bin Haji Abdullah J dated 9 October 1995 as seen in exh. "BHL" at p. 100 of Teh's affidavit in encl. 11 conclusively showed that the rule of *res judicata* should be applied to the factual matrix of the present case. This was my judgment and I so hold accordingly.

**Issue (3)**

In regard to the issue of compound interest that was raised by the defendant, Teh deposed at para. 8 of encl. 11 that there was no calculation of interest upon interest as alleged by the defendant. In encl. 11 at para. 8 too, the particulars of the calculation of the various interest components were set out in minute detail. And at para. 9 of encl. 11, Teh in his deposition reiterated that there was no defence to the plaintiff's claim and for that reason Teh sought for summary judgment against the defendant.

In my judgment, this was a perfect case for summary judgment. All the documents were in favour of the plaintiff. There was no triable issue shown by the defendant to warrant a trial (*Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399). In *Penang Port Commission v. Kanawagi Seperumaniam (No 3)* [1998] 4 CLJ 8, Malek Ahmad JCA (now FCJ) at p. 15 of the report had this to say:

> We had analysed the affidavits and carefully considered the arguments of both learned counsel. We had also gone through the judgment of the learned trial judge. It was his finding that the statement of defence was a bare denial and the appellant cannot improve on his pleadings through affidavit evidence. With respect to the learned trial judge, we are of the view that in an application for summary judgment, Order 14 rule 4(1) of the Rules of the High Court 1980 (hereinafter 'the Rules') applies and it is to the effect that a defendant may show cause against the application of affidavit or otherwise to the satisfaction of the court. That means that cause against the application can be shown by affidavit or in a statement of defence. Just as a statement of defence can be improved upon by amendment, it is an even stronger reason under the rule for the statement of defence to be clarified through an affidavit.

Now, the crucial question to pose would be: whether the defendant here had shown by affidavit or in their statement of defence cause against the application for summary judgment to the satisfaction of this court? It must be recalled that the learned counsel for the defendant in advancing his arguments pertaining to:

(1) the purported failure of the plaintiff to prove that the plaintiff was entitled to receive the assignment of the debt from Daito Kogyo Company Limited; and

(2) the validity of the deed of compromise was questionable.

made no reference at all to the affidavits filed by the defendant in resisting the plaintiff's summary application. This approach adopted by the learned counsel for the defendant was hardly surprising. There was, in fact, nothing in the affidavit evidence of the defendant which could support the learned counsel for the defendant's arguments in countering the O. 14 application. It was an argument made in futility and out of sheer desperation. It was also an exercise of mere semantics devoid of merit.

It must be emphasised that even though the defendant had entered an appearance on 18 November 1999, yet the defendant saw it fit not to file the statement of defence. Without the statement of defence, the speech of Malek Ahmad JCA (now FCJ) in *Penang Port Commission v. Kanawagi Seperumaniam (No 3) (supra)* about the need to refer to the statement of defence in order to show cause against the application for an O. 14 cannot be invoked in favour of the defendant. There was no statement of defence for this court to peruse upon. The plaintiff here just like the plaintiff in *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra)* had fulfilled all the three requirements of an O. 14 application as laid down by Seah FJ in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220, [1984] 1 CLJ 283 FC in that:

(1) the defendant had entered an appearance;

(2) the statement of claim had been served on the defendant; and

(3) the affidavit in encl. 3 deposed to by Teh had complied with the requirements by O. 14 r. 2 of the RHC.

and so I had no choice but to shift the onus onto the defendant for the defendant to satisfy me why judgment should not be entered against the defendant. But alas, the defendant had failed to discharge that onus.

In regard to the defendant's allegation that it had executed the deed of compromise on condition that SDJV was to ensure that its parent company, Daito Kogyo Co Ltd will finance the reclamation project at Port Dickson until completion, Nobuyuki Suzuki affirmed an affidavit on 5 April 1991 as seen at p. 39 of encl. 11 and at para. 6 thereto he deposed the following pertinent points:

> With regard to paragraph 20, 21 and 22 of the defendant's affidavit, I state that the allegations therein is totally untrue and made as an afterthought. SDJV is owned 51% by Safuan Holdings Sdn Bhd and 49% by Daito Kogyo Co. Ltd and I challenge the defendant to dispute this. It is obvious from the terms of the deed of compromise between SDJV and the defendant that such a term

was never part of the bargain and in fact such a term if at all breached would run counter to the arrangements embodied in the deed of compromise.

and when Nobuyuki Suzuki affirmed this affidavit it was done in relation to the foreclosure proceedings that was filed by the plaintiff. When Nobuyuki Suzuki referred to "paras. 20, 21 and 22 of the defendant's affidavit", he was in fact referring to the affidavit of Mohd. Shamlan bin Ahmad that was affirmed on 7 February 1991 as exhibited in exh. "BHE" of encl. 11 at p. 21 to p. 26 thereof. This was what Mohd Shamlan bin Ahmad said in his affidavit that was affirmed on 7 February 1991:

> 20. Saya juga menyatakan di dalam ini bahawa defendan bersetuju menandatangani deed tersebut dengan syarat SDJV akan memastikan syarikat induk (parent company) SDJV iaitu Daito Kogyo Co Ltd ('DKC') of Japan akan membiayai projek penebusan tanah di Port Dickson sehingga selesai.
>
> 21. SDJV telah gagal memenuhi obligasinya dengan memastikan bahawa DKC membiayai projek ini sehingga selesai.
>
> 22. Oleh kerana SDJV, parti dengan mana defendan telah menandatangani deed tersebut telah mengingkari obligasinya, defendan tidaklah terikat dengan dan adalah dilepas dari terma-terma deed tersebut.

Nobuyuki Suzuki's affidavit silenced the averments of Mohd. Shamlan bin Ahmad. Indeed it was an erroneous assumption on the part of the defendant that the plaintiff was holding a 49% stake of SDJV.

Next, going on an uphill task, the defendant, on a low key, questioned the validity of the deed of compromise as seen in exhibit marked as "DK1" of encl. 3. To me, the validity of the deed of compromise was beyond question. In the absence of fraud or misrepresentation, the defendant's signatures appearing on the deed of compromise sealed the fate of the defendant once and for all. Those signatures were sufficient to bind the defendant to the deed of compromise. In *Tac Construction & Trading v. Bennes Engineering Bhd* [1999] 2 CLJ 117, 145, I had occasion to say something about the value of a signature that appears in a document and this was what I said:

> Of crucial importance, in so far as the exhibits in 'TAC2' and 'TAC3' of enclosure 6 are concerned, would be the signatures of the project manager found therein and the defendant did not dispute these signatures at all. I must say something about signatures generally. The case of *Geary v. Physic* [1826] 5 B. & C. 234 establishes beyond doubt that even a signature by pencil is sufficient. The signature appearing on a telegraph form can even be considered to be sufficient and this found favour in at least three old vintage cases. Firstly, *Godwin v. Francis* [1870] LR 5 CP 295. Secondly, *Mc Blain v. Cross* [1872] 25 LT 804. Thirdly, *R v. Riley* [1896] 1 QB 309, 313. Then there is the

principle that a signature by means of a mark is also considered as sufficient (*Baker v. Dening* [1838] 8 A. & E. 94 (signature of a will), and *Dyas v. Stafford* [1881] 7 LR Ir. 590). Signatures by initials have also been considered to be clearly sufficient (In the *Goods of Blewitt* [1879] 5 PD 116 (signature of will); *Phillimore v. Barry* [1818] 1 Camp. 513; *Chichester v. Cobb* [1866] 14 L.T. 433; and *Hill v. Hill* [1947] Ch. 231, 240).

It must be emphasised, and this was certainly in favour of the plaintiff, that there was no affidavit evidence emanating from the defendant, whether it was in the present proceedings or in relation to the earlier foreclosure proceedings, to show that the signatures of the defendant that appeared in the deed of compromise have been procured by unlawful means. That being the case, the validity of the signatures of the defendant that appeared in the deed of compromise can never be challenged.

Reverting back to the doctrine of *res judicata*, it was part and parcel of my judgment that the defendant ought not be permitted to re-litigate the same issues that have been litigated in the foreclosure proceedings before the Seremban High Court. The foreclosure proceedings was distinctly determined and finally adjudicated upon by a court of competent jurisdiction presided over by my brother judge justice Mohd Noor bin Haji Abdullah sitting in the Seremban High Court and his Lordship had on 9 October 1995 granted an order for sale of the land on the application of the plaintiff and the defendant withdrew its appeal against the order for sale on 14 June 1999. The affidavits filed by the defendant in regard to the foreclosure proceedings revealed, as a fact, that there were identical issues raised by the defendant in the foreclosure proceedings as well as in the present proceedings. I need only refer to two affidavits affirmed by Mohd Shamlan bin Ahmad to buttress my points. The first affidavit of Mohd Shamlan bin Ahmad was affirmed on 7 February 1991 in relation to the foreclosure proceedings as seen at p. 21 of encl. 11 at paras. 7 to 22 thereof, while the second affidavit of the same individual was affirmed on 21 May 1991 in relation to the foreclosure proceedings as seen at p. 41 of encl. 11 at paras. 3 to 6 and 10 thereof. These two affidavits affirmed in relation to the foreclosure proceedings showed that the doctrine of *res judicata* must be vigorously applied to the factual matrix of the present appeal. The law journals are replete with authorities on the doctrine of *res judicata*. These authorities serve as excellent guidelines in understanding the said doctrine. I must now refer to these authorities in succession. For starters, it would be the case of *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; ([1986] CLJ (Rep) 256), where that brilliant judge in the person of Abdoolcader SCJ had this to say at p. 553 (p. 261) of the report:

The earlier action instituted by the respondent on July 2, 1985 and which was struck out sought relief on the ground of discrimination in breach of article 8

of the Constitution but in the present proceedings the grounds for relief have been augmented and declarations sought to the effect we have indicated earlier. The appellants plead *res judicata* in this regard and we think the point is well taken and is supported by authority, and we would refer to the pronouncement of the Privy Council in *Hoystead & Ors. v. Commissioner of Taxation* [1926] A.C. 155 and a catenation of cases to the like effect, namely, that the plea of *res judicata* applies, except perhaps where special circumstances may conceivably arise of sufficient merit of exclude its operation, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel per *rem judicatum* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any reagitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty. Ltd. v. Attorney-General for Queensland* [1979] A.C. 411, 425:

> The second defence is one of '*res judicata*.' There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C. in *Hendersonn v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] A.C. 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581. It was, in the judgment of the Board, there described in these words:
>
> > ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings (p. 590).

This would be followed by the case of *SCF Finance Co Ltd v. Masri and Another (No 3) (Masri, garnishee)* [1987] 1 All ER 194, where Ralph Gibson LJ speaking for the Court of Appeal succinctly said at p. 207 of the report:

> But is that issue to be treated as having been decided by virtue of the order dismissing Mrs Masri's application to discharge the Mareva injunction? Before

Leggatt J and on this appeal counsel for SCF relied on the principles restated in this court in *Khan v. Goleccha International Ltd* [1980] 2 All ER 259, [1980] 1 WLR 1482. In that case an order by consent had been made by the Court of Appeal on the basis of an express acceptance by counsel for the plaintiff borrower that a transaction was not one of moneylending and was outside the scope of the Moneylenders Act 1929. Later the plaintiff brought an action against the defendant company claiming that the debt was statute-barred by s. 13(1) of that Act. In his judgment, with which Cumming-Bruce and Bridge LJJ agreed, Brightman LJ referred to the express acceptance by counsel before the Court of Appeal that the transaction was not a lending of money, and to the dismissal of the appeal on that basis, and asked 'Does that admission and the consent order so made give rise to estoppel, more particularly to the brand of estoppel sometimes called issue estoppel?' He then continued ([1980] 2 All ER 259 at 264-265, [1980] 1 WLR 1482 at 1488-1489):

> First, for the general principle (*Ord v. Ord* [1923] 2 KB 432 at 439 [1923] All ER Rep 206 at 210 per Lush J; I need not narrate the facts): "The words '*res judicata*' explain themselves. If the *res* – the thing actually or directly in dispute – has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often as covered by the plea of *res judicata*, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward …" I turn straight to the wider principle ([1923] 2 KB 432 at 443, [1923] All ER Rep 206 at 212): "The maxim *'Nemo debet bis vexari'* prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been."

After a reference to the opinion of Lord Wilberforce in *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 584, [1967] 1 AC 853 at 964-965 as to the material at which the court may look in order to identify the issue:

not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence … and if necessary other material to show what was the issue decided ... .

Continuing at p. 208 of the report, Ralph Gibson LJ had this to say:

> The decision in *Khan*'s case [1980] 2 All ER 259, [1980] 1 WLR 1482 makes it clear that an order dismissing proceedings is capable of giving rise to issue estoppel even though the court making such order has not heard argument or evidence directed on the merits. If in the present case there had been no attempt expressly to preserve the issue of the beneficial ownership of the dollar account by not conceding it, the effect of Mrs Masri declining to proceed with the hearing and acknowledging that her application must be dismissed, must in our judgment have been finally to determine the issue against Mrs Masri. That effect must have followed because decision of the issue, one way or the other, was the 'necessary step' to the decision which the court would have had to make if the court had proceeded to hear Mrs Masri's application the merits (see per Lord Wilberforce in *Carl-Zeiss Stiftung v. Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 at 584, [1967] 1 AC 853 at 964 cited by Brightman LJ in *Khan*'s case). If a party puts forward a positive case, as the basis of asking the court to make the order which that party seeks, and than at trial declines to proceed and accepts that the claim must be dismissed, then that party must, in our view, save in exceptional circumstances, lose the right to raise again that case against the other party to those proceedings.

To round it up, Ralph Gibson LJ said at p. 209 of the report:

> The principle of the decision of this court in *Khan*'s case is, in our judgment, applicable to this case: a litigant who has had an opportunity of proving a fact in support of his claim or defence and has chosen not to rely on it is not permitted afterwards to put it before another tribunal. In this case, Mrs Masri had her opportunity to establish the case on which her application was based; and she chose not to establish her alleged ownership of the dollar account. Her counsel on her instructions acknowledged that her application must be dismissed. His attempt to reserve the issue was, in our judgment, ineffective.

In *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 the Privy Council upheld the application by the Supreme Court of Hong Kong of the doctrine of *res judicata* in the wider sense, namely that it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. Lord Kilbrandon, giving the judgment of their Lordships, gave warning (at 590):

> The shutting out of a 'subject of litigation' [was] a power which no court should exercise but after scrupulous examination of all the circumstances [the exercise of such a power] is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule.

Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, explained the meaning and purport of *res judicata* in some detail. At p. 791 of the report, his Lordship had this to say:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in the other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.
>
> Since a *res judicata* creates an estoppel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of *estoppel per rem judicatum*, the latter being described sometimes in a rather archaic way as estoppel by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an estoppel *per rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.
>
> The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p 115 which is:
>
> > The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

It is correct to say and I so say that all the courts in the world adhere to the principle that there must be an end to litigation: interest *reipublicae ut sit finis litium*. Cases like *Re May* [1885] 28 Ch D 516 at 518, CA; *Re Graydon, ex parte Official Receiver* [1896] 1 QB 417; *Philips v. Bury* [1696] Holt KB 715; *Badar Bee v. Habib Merican Noordin* [1909] AC 615, PC; *Hoystead v. Taxation Comr* [1926] AC 155 at 165, PC; *R v. Middlesex JJ, ex p Bond* [1933] 2 KB 1, CA; and *Danks v. Farley* [1853] 1 WR 291 subscribed to the time honoured principle of putting an end to litigation. The plea of *res judicata* should succeed where the cause of action is the same (*Hills v. Co-operative Wholesale Society Ltd* [1940] 2 KB 435, [1940] 3 All ER 233, CA) and that cause of action has been determined on its merits (*Glasgow and South-Western Rly Co v. Boyd and Forrest* [1918] SC 14; *Long v. Gowlett* [1923] 2 Ch 177 and *Alfred Rowntree & Sons Ltd v. Frederick Allen & Sons (Poplar) Ltd* [1935] 41 Com Cas 90).

Broadly stated, the doctrine of *res judicata* can easily be stated and it too can readily be applied to a given situation. For instance, if evidence is led in the second application which is exactly the same as that led in the previous application then the doctrine of *res judicata* would be vigorously invoked (*Re F (W) (An infant))* [1969] Ch 269, [1969] 3 All ER 595). Again, if the defendant obtains judgment in a libel action in respect of certain parts of a publication that constitutes a defence of *res judicata* in respect to a second action especially when the subject matter of both actions were the same (*Mac Dougall v. Knight* [1890] 25 QBD 1, CA), then the defence of *res judicata* would apply. Having said all these, the present appeal in encl. 13 must be governed by the principle of *res judicata* and that can never be doubted.

The defendant fell into error and was wrong when it submitted that the plaintiff made a further claim on the interest to the sum of RM15,299,680.80 from 9 March 1997 until 3 November 1997 for the sum of RM473,043.18 thereby raising, so said the defendant, the total outstanding sum to RM15,772,723.98. Teh's affidavit in encl. 3 at para. 21(ii) was self explanatory and it explained the issue of interest once and for all. There, Teh deposed that the interest was calculated on the principal sum of RM7,224,300 from 9 March 1997 to 3 November 1997 calculated at the rate of 10% per annum. The particulars of the interest components were nicely explained by Teh in his affidavit in encl. 11 at para. 8 and there he deposed that when the proceeds of sale totalling RM11,114,975 were applied towards settlement of the accrued debt of principal and interest, the interest element in the global sum of RM8,548,423.98 was completely extinguished, leaving a balance of the principal sum of RM4,657,748,98. The plaintiff categorically said that there was nothing contradictory about the sum of RM4,657,748.98 that appeared at p. 9 of Teh's affidavit in encl. 11 with the sum of RM5,585,086.12 that appeared at p. 13 of Teh's affidavit in encl. 3. The sum of RM5,585,086.12 was also itemised as a prayer in the statement of claim and these sums referring to RM4,657,748.98 and RM5,585,086.12 represented the plaintiff's claims against the defendant which were outstanding as at different points of time, namely, on 3 November 1997 and 12 October 1999 respectively.

This was a case just like that of *Sediperak Sdn Bhd v. Baboo Chowdhury* [1999] 5 CLJ 31 where there was no necessity at all to proceed to trial. The affidavits together with the relevant documents that were alluded to in the early part of this judgment were sufficient to uphold the decision of the learned SAR in relation to encl. 13. The learned SAR rightly entered summary judgment against the defendant in favour of the plaintiff. The present appeal and the facts surrounding it were suitable for summary judgment. There was no necessity for a trial at all. Just like the case of *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v. Ghazali bin Ibrahim* [1985] 2 MLJ 225,

226, a decision of his Lordship Mohamed Dzaiddin J (as he then was and now the Chief Justice of Malaysia), the entire appeal revolved on the facts rather than the law and the defendant had failed, rather miserably, to show a *bona fide* defence to the plaintiff's claim. This was my judgment and I so hold accordingly.

For the reasons adumbrated above, I dismissed the defendant's appeal in encl. 13 with costs.